

# TIME OFF WORK FOR MENSTRUATION: A GOOD IDEA?

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*In February 2023, Spain became the first European country to guarantee “menstrual leave” for workers, joining several countries, mostly in East Asia, that have long done so. It has also become increasingly common for companies to offer paid time off to menstruators as a discretionary benefit. Reports on these developments are almost always accompanied by criticism from self-identified feminists voicing concern that the policies will spur discrimination against women or reinforce stereotypes about menstruators as incapable workers. This echoes earlier arguments over maternity leave.*

*In their groundbreaking book, Menstruation Matters, Bridget Crawford and Emily Waldman expose myriad ways in which workplaces can be inhospitable to menstruators, and they offer an extremely helpful introduction to the debate over menstrual leave. This Essay builds on their analysis to take a deeper dive into the issue. It argues that there are alternatives to leave that could address many of these problems without triggering the same concerns of backlash. These include effective enforcement of existing laws and regulations relating to restroom access, break time, and workplace accommodations for various health needs. Additionally, employers can provide free menstrual products in workplace restrooms to allow workers to handle periods with dignity—even when they start unexpectedly—and help destigmatize menstruation.*

*Even if these practices become routine, some menstruators might need to miss work when experiencing severe menstrual symptoms. The Essay suggests that rather than seeking menstrual-specific leave, advocates might join forces with the burgeoning campaign to guarantee adequate paid sick days for all workers. Menstruation is not an illness, but most such laws are written broadly enough to meet menstruators’ needs. This universal approach, designed to support a broader swath of workers, would probably be easier to pass politically, and it would be far less likely to result in workplace discrimination against menstruators.*

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*“Employers Are Starting to Adopt ‘Menstrual Leave’ Policies. Could it Backfire?”*—Time, Oct. 8, 2021<sup>1</sup>

*“More and more companies are answering the call to provide period leave – yet some critics remain sceptical.”*—BBC, Apr. 28, 2022<sup>2</sup>

*“Is Paid Menstrual Leave a Good Idea?”*—Quartz, May 13, 2022<sup>3</sup>

## INTRODUCTION

As the headlines that open this essay demonstrate, a growing number of companies are offering “menstrual leave”—policies that provide paid time off from work for menstruating individuals.<sup>4</sup> Several countries, mostly in East Asia, have long required menstrual leave, and in February 2023, Spain became the first European country to do so.<sup>5</sup> Reports on this trend are almost always accompanied by caveats and questions as to whether the policies advance or inhibit women’s rights. The loudest criticism often comes from self-identified feminists, who voice concerns that the policies will spur discrimination against women or reinforce stereotypes about menstruators as incapable workers.<sup>6</sup> In their groundbreaking book, *Menstruation Matters: Challenging the Law’s Silence on Periods*, Bridget J. Crawford and Emily Gold Waldman offer an extremely helpful introduction to the debate over menstrual leave policies, and more generally to the ways in which

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<sup>1</sup> Ashifa Kassam, *Employers Are Starting to Adopt ‘Menstrual Leave’ Policies. Could It Backfire?*, TIME (Oct. 8, 2021, 2:42 PM), [https://time.com/6105254/menstrual-leave-policies/?utm\\_source=ourcommunitynow&utm\\_medium=web](https://time.com/6105254/menstrual-leave-policies/?utm_source=ourcommunitynow&utm_medium=web) [<https://perma.cc/KJS8-HFDQ>].

<sup>2</sup> Ali Francis, *Could ‘Menstrual Leave’ Change the Workplace?*, BBC (Apr. 28, 2022), <https://www.bbc.com/worklife/article/20220426-could-menstrual-leave-change-the-workplace> [<https://perma.cc/TVQ4-TNVX>].

<sup>3</sup> Sarah Todd, *Is Paid Menstrual Leave a Good Idea?*, QUARTZ (May 13, 2022), <https://qz.com/work/2165491/is-paid-menstrual-leave-a-good-idea> [<https://perma.cc/W5FH-GGGC>].

<sup>4</sup> I typically refer to persons who menstruate as “menstruators,” a purposefully gender-neutral term, meant to make clear trans-boys and -men and non-binary persons may menstruate. However, it is also important to recognize that the vast majority of menstruators are cis-gender girls and women, and that barriers to full participation by menstruators therefore implicate key questions of sex equality.

<sup>5</sup> See, e.g., Niha Masih, *Need Time Off Work for Period Pain? These Countries Offer ‘Menstrual Leave.’*, WASH. POST (Feb. 17, 2023), <https://www.washingtonpost.com/world/2023/02/17/spain-paid-menstrual-leave-countries> [<https://perma.cc/C8FG-V652>]; see also *infra* text accompanying notes 34–38.

<sup>6</sup> See *infra* text accompanying notes 45–48.

menstruation can affect work.<sup>7</sup> This Essay uses their analysis as a jumping-off point for a deeper dive into these issues.

Menstrual leave is often compared to maternity leave, and in that context, too, there has long been unease that so-called “special” treatment could hurt the policy’s intended beneficiaries by spurring discrimination against new mothers or female employees more generally.<sup>8</sup> These risks are likely heightened in the menstruation context for several reasons.<sup>9</sup> First, because most workers give birth to (or adopt or foster) relatively few children, most workers will seek maternity or parental leave only a handful of times during their working lives; menstruation, by contrast, generally occurs monthly. Thus, employers might fear having to provide time off far more frequently under a menstrual leave policy than under a maternity or parental leave policy. Second, whereas maternity leave can be (and in the United States generally is) replaced by a gender-neutral parental leave that lets both fathers and mothers take leave for infant care, there is no gender-neutral analog for menstrual leave. The fact that menstrual leave is inherently gendered may heighten the risk that it would lead to more general discrimination against women.

Menstrual justice advocates are rightly concerned that workplaces are often inhospitable to menstruators. However, there are alternatives to menstrual leave that could support menstruators at work without as much risk of backlash. For example, effective enforcement of existing laws and regulations relating to restroom access and workplace accommodations can reduce the need for workers to take time off when menstruating. Likewise, providing free menstrual products in workplace restrooms can help to ensure menstruating workers can handle periods with dignity, even if they start unexpectedly, and also help destigmatize menstruation. Even if these practices become routine, some menstruators might need to take time off work when experiencing severe menstrual symptoms. To address this, advocates might join forces with the burgeoning campaign to guarantee adequate paid sick days for all workers. Menstruation is not an illness, but most such laws are written broadly enough to meet menstruators’ needs. This universal approach, designed to support a broader swath of workers, would

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<sup>7</sup> See BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW’S SILENCE ON PERIODS* 120–28 (2022) [hereinafter *MENSTRUATION MATTERS*]. In an understated way, Crawford and Goldman suggest skepticism regarding the merits of leave policy, characterizing the possibility as “intriguing” but heading their discussion of it with a question mark: “Menstrual Leaves?”. See *id.* at 120. Until very recently, there was almost no discussion of this topic in the legal academic literature. However, it has recently received significantly more attention. See generally Marcy L. Karin, *Addressing Periods at Work*, 16 HARV. L. & POL’Y REV. 449 (2022); Hilary H. Price, *Periodic Leave: An Analysis of Menstrual Leave as a Legal Workplace Benefit*, 74 OKLA. L. REV. 187 (2022).

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* Part IV.

probably be easier to pass politically and it would be far less likely to spur workplace discrimination against menstruators.

This Essay proceeds as follows. Part I offers a brief overview of Crawford & Waldman’s book and the pervasiveness of menstrual stigma. Part II addresses how menstruation can affect the workplace and then discusses the growth of menstrual leave policies more generally. Part III shows that debates over menstrual leave policies are similar to earlier debates over policies relating to pregnancy and infant care. Part IV discusses the aptness and limitations of analogizing menstruation to pregnancy and suggests benefits to adopting more universal approaches.

## I

### “IF MEN COULD MENSTRUATE”

Crawford & Waldman’s book is a major accomplishment. In it, they offer an insightful and detailed discussion about how menstruation affects myriad legal questions; indeed, simply identifying the issue is itself groundbreaking. They show that policymakers and legal theorists have generally, at least until very recently, ignored menstruation—a phenomenon experienced by roughly half of the human population for a significant portion of their lives. The book gives substance to important questions that have been hiding in plain sight. As the authors discuss, while at first “silence about menstruation may seem unsurprising,” this invisibility has had real costs.<sup>10</sup> In numerous ways, menstruation can interfere with menstruators’ full engagement in public life.<sup>11</sup> A growing menstrual advocacy movement, in the United States and around the world, has called attention to these inequities and the need for policy reform.

One of the strengths of the book is its broad scope. The authors explore the implications of menstruation in schools, prisons, and workplaces;<sup>12</sup> the ways in which companies seek to profit from menstruation and the link between menstruation, health, and the environment;<sup>13</sup> and the interplay between advocacy in the United States and comparable reform efforts gaining strength in other countries.<sup>14</sup> A throughline in these discussions is the role that “menstrual stigma” has played, and continues to play, in the experience of menstruation.<sup>15</sup> Health conditions are often considered private. However, menstruation is not just private—it is frequently viewed with shame and disgust by both men and women. Indeed, as Crawford &

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<sup>10</sup> MENSTRUATION MATTERS, *supra* note 7, at 1.

<sup>11</sup> *See, e.g., id.* at 22, 78, 137.

<sup>12</sup> *See id.*, especially chapters 3–5.

<sup>13</sup> *See id.*, especially chapters 7–8.

<sup>14</sup> *See id.*, especially chapter 9.

<sup>15</sup> *See id.*, especially chapter 1.

Waldman point out, most cultures have developed an extensive list of euphemisms to avoid even using the word menstruation.<sup>16</sup>

Menstrual stigma has implications for the workplace. For example, in one telling study discussed by Crawford & Waldman, researchers informed participants they were taking part in a study on “group productivity,” and then varied whether a participant’s assigned partner accidentally dropped a wrapped tampon or a hairclip when reaching into her purse.<sup>17</sup> Both male and female study participants reacted far more negatively to the tampon dropper; they deemed her to be “less competent” and “less likeable,” and many avoided sitting in a chair directly next to her.<sup>18</sup> Other studies corroborate such negative assessments, even when the study design does not vary the *actual* skills or capacities of the purported menstruator.<sup>19</sup>

The negative valence of menstruation is intertwined with the extent to which public life is patriarchal—that is, designed to fit male bodies and male life experiences.<sup>20</sup> Crawford & Waldman powerfully illustrate this by referencing a seminal—and pause for a moment to consider the etymology of that word—essay by Gloria Steinem in which she imagines what would happen if “suddenly, magically, men could menstruate and women could not.”<sup>21</sup> (The essay was originally published in 1978, and it uses a binary construction of gender.) Steinem posits, I think persuasively, that “menstruation would become an enviable, boast-worthy, masculine event”: Men would “brag about how long and how much,” “young boys would talk about it as the envied beginning of manhood,” and doctors would prioritize research designed to address cramps and the more serious physical discomforts that can accompany menstruation.<sup>22</sup>

As Crawford & Waldman point out, this larger context of stigma, shame, and patriarchy profoundly affects debates around menstrual leave

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<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.* at 19.

<sup>18</sup> Tomi-Ann Roberts, Jamie L. Goldenberg, Cathleen Power & Tom Pyszczynski, “Feminine Protection”: *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCH. WOMEN Q. 131, 136 (2002).

<sup>19</sup> See, e.g., Jessica L. Barnack-Tavlaris, Kristina Hansen, Rachel B. Levitt & Michelle Reno, *Taking Leave to Bleed: Perceptions and Attitudes Toward Menstrual Leave Policy*, 40 HEALTH CARE FOR WOMEN INT’L 1355, 1357–58 (2019) (summarizing research).

<sup>20</sup> See generally, e.g., Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN’S L.J. 83, 92 (1980) (arguing how legal rules that developed to implement capitalism also restricted women from participating in public life); JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000) (describing how workplaces are designed around typically male life experiences).

<sup>21</sup> MENSTRUATION MATTERS, *supra* note 7, at 22 (quoting Gloria Steinem, *If Men Could Menstruate*, MS., Oct. 1978, reprinted in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES 353 (Chris Bobel et al. eds., 2020)).

<sup>22</sup> Gloria Steinem, *If Men Could Menstruate*, MS., Oct. 1978, reprinted in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES 353–54 (Chris Bobel et al. eds., 2020).

and the experience of menstruation at work more generally.<sup>23</sup> It means potential beneficiaries of a menstrual leave policy may be uncomfortable claiming it, and coworkers and supervisors (including some who menstruate but may not have particularly difficult periods) may lack basic knowledge about how menstruation can interfere with the ability to work. Because of this stigma, efforts to provide workplace supports for menstruators may lead to backlash and discrimination against the very people they are designed to help. The next parts take up these issues.

## II

### MENSTRUATION AND WORK

Menstruation typically begins at around age 13 and continues until about age 50.<sup>24</sup> In other words, roughly one half of the working population experiences menstruation through the majority of their working years. There is significant variety in menstrual patterns. Cycles range from 21 to 35 days, and typical flow ranges from two to seven days.<sup>25</sup> For some people it is as regular as clockwork; for others, it is highly irregular. Additionally, as the Mayo Clinic puts it, menstrual flow may be “light or heavy, painful or pain-free, long or short, and still be considered normal.”<sup>26</sup> Menstruation may cause cramps, mood swings, headaches, back pain, tiredness, and other symptoms.<sup>27</sup> During perimenopause, a period of approximately seven years before the permanent cessation of menstruation known as menopause, menstruators often experience erratic periods with particularly heavy flows of blood, as well as sleep disturbance, hot flashes, mood changes, and other

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<sup>23</sup> MENSTRUATION MATTERS, *supra* note 7, at 125–28.

<sup>24</sup> See, e.g., Mariana Chavez-MacGregor, Carla H. van Gils, Yvonne T. van der Schouw, Evelyn Monnikhof, Paulus A. H. van Noord & Petra H. M. Peeters, *Lifetime Cumulative Number of Menstrual Cycles and Serum Sex Hormone Levels in Postmenopausal Women*, 108 BREAST CANCER RSCH. & TREATMENT 101, 103 (2008) (noting that menstruators experience an average of 34.7 years of menstrual activity; a rate of 13 menstrual cycles per year). Of course, when pregnant, menstruation stops, and many people do not menstruate while breastfeeding. See, e.g., *When Will My Periods Start Again After Pregnancy?*, NAT’L HEALTH SERV. (last updated Apr. 24, 2021), <https://www.nhs.uk/common-health-questions/pregnancy/when-will-my-periods-start-again-after-pregnancy> [<https://perma.cc/HS23-N97W>] (discussing when menstruation might begin again post-pregnancy). Some forms of contraception may also suppress or reduce the frequency of menstruation. See generally, e.g., Christine L. Hitchcock & Jerilynn C. Prior, *Evidence About Extending the Duration of Oral Contraceptive Use to Suppress Menstruation*, 14 WOMEN’S HEALTH ISSUES 201 (2004) (reviewing studies assessing uses of oral contraceptives to suppress menstruation).

<sup>25</sup> *Menstrual Cycle: What’s Normal, What’s Not*, MAYO CLINIC (Apr. 29, 2021), <https://www.mayoclinic.org/healthy-lifestyle/womens-health/in-depth/menstrual-cycle/art-20047186> [<https://perma.cc/VY83-GCKZ>].

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., Barnack-Tavlaris et al., *supra* note 19, at 1357.

symptoms.<sup>28</sup> Depending on the nature of the period, *and* the nature of an individual's job, it may be very easy to work during one's period or very difficult.

There is a relatively small body of research specifically on menstruation and the extent to which it disrupts work, but the findings are striking.<sup>29</sup> In a recent Dutch study, reportedly the largest cohort study ever done on this subject, 11.2% of women reported missing work because of their periods at least once during a six-month period, and 2.4% of respondents reported missing work virtually every cycle.<sup>30</sup> Most of the women in the study who missed work simply told their employer that they were sick on these days—not identifying menstruation as the cause.<sup>31</sup> Additionally, more than 80% of respondents indicated that they were less productive than normal during at least some days of their periods.<sup>32</sup> A study in the U.S., focusing specifically on women with endometriosis, a condition that can cause severe pain during periods, found that on average, the respondents missed about one half day of work per month and they reported they were less productive at work for several days during their periods.<sup>33</sup>

A handful of countries have responded to the disruptions that menstruation can cause by mandating that employers provide menstrual leave.<sup>34</sup> Several countries, mostly in East Asia, enacted laws decades ago; others have done so more recently, including Spain, which in February 2023

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<sup>28</sup> See Karin, *supra* note 7, at 455–56, 458–59 (discussing symptoms of perimenopause).

<sup>29</sup> See, e.g., *id.* at 461 (characterizing the impact of menstruation on work as “understudied” but summarizing the research that does exist as “clearly demonstrating that menstruation and menopause impact work”); *id.* at 461–66 (discussing studies).

<sup>30</sup> See Mark E. Schoep, Eddy M. M. Adang, Jacques W. M. Maas, Bianca De Bie, Johanna W. M. Aarts & Theodor E. Nieboer, *Productivity Loss Due to Menstruation-Related Symptoms: A Nationwide Cross-Sectional Survey Among 32,748 Women*, *BMJ OPEN*, 2019, at 2, 4–5 (2019).

<sup>31</sup> See *id.* at 6 (reporting that of participants in the study, which included both students and workers who were absent because of menstruation, only approximately 20% told their employer or school that menstruation was the reason for the absence, whereas approximately 46% mentioned presenting symptoms, approximately 28% gave no reason, and approximately 6% made up a reason).

<sup>32</sup> See *id.* at 5. This is characterized as “presenteeism,” that is, someone who is physically present but whose lost productivity is comparable to that of absentees. See *id.*

<sup>33</sup> See Ahmed M. Soliman, Karin S. Coyne, Katharine S. Gries, Jane Castelli-Haley, Michael C. Snabes & Eric S. Surrey, *The Effect of Endometriosis Symptoms on Absenteeism and Presenteeism in the Workplace and at Home*, 23 *J. MANAGED CARE & SPECIALTY PHARM.* 745, 752 (2017). Specifically, the article reports respondents were absent, on average, 1.1 hours per week and less productive at work 5.3 hours per week. See *id.* at 748. The text converts these averages into approximate monthly figures to better capture the likely pattern of absences and productivity loss due to menstruation.

<sup>34</sup> MENSTRUATION MATTERS, *supra* note 7, at 120–21; see also Marian Baird, Elizabeth Hill & Sydney Colussi, *Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labor Entitlement to Reinforce, Remedy, or Revolutionize Gender Equality at Work?*, 42 *COMPAR. LAB. L. & POL'Y J.* 187, 226–27 (2021) (comparing menstrual leave policies, laws, and proposals in different countries over time); Karin, *supra* note 7, at 502–10 (similar); Price, *supra* note 7, at 189–96 (similar).

became the first European country to mandate leave.<sup>35</sup> In many countries, the laws were spurred by pro-natalist government policies—notably, with women somewhat divided as to whether they were helpful or harmful to efforts to achieve broader sex equality at work.<sup>36</sup> Even after the passage of these laws, however, some women have shown to be reluctant to claim benefits. This reluctance is particularly acute in modern-day workplaces. In Japan, for example, reports suggest that in 1965, approximately a quarter of women claimed menstrual leave; by 2017, fewer than one percent of women did.<sup>37</sup> More broadly, contemporary women have cited fear of discrimination as a big deterrent, and they have suggested that even if they did need to miss work because of their periods, they would rather claim regular sick time.<sup>38</sup>

Menstrual leave does not have to be mandated by governments, however—companies themselves can choose to provide menstrual leave as part of a more general benefits package, even when not required by law to do so.<sup>39</sup> This is becoming increasingly common.<sup>40</sup> For example, a gender-equality organization in Melbourne recently introduced a policy in its own workplace and shared a template to help other Australian businesses and organizations do the same.<sup>41</sup> The sample policy provides up to twelve paid days per year, and it permits employees to work from home or rest as needed during the day. The policy also asserts that it “seeks to remove the stigma and taboo surrounding menstruation and menopause,” presumably by openly addressing the subject and providing a dedicated right to leave for menstrual-related needs.<sup>42</sup> What is more, employee use under discretionary company

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<sup>35</sup> See Baird et al., *supra* note 34, at 226–27 (discussing menstrual leave policies in several different countries); Nicolas Camut, *Spain Approves Paid Menstrual Leave, First Country in Europe To Do So*, POLITICO (Feb. 16, 2023), <https://www.politico.eu/article/bill-europe-spain-parliament-creates-first-menstrual-leave-in-europe> [<https://perma.cc/H52H-XDV3>].

<sup>36</sup> See generally Baird et al., *supra* note 34, at 194–204 (discussing the political impetus for and controversies over the laws).

<sup>37</sup> Julia Hollingsworth, *Should Women Be Entitled to Period Leave? These Countries Think So*, CNN BUS. (Nov. 20, 2020, 7:13 PM), <https://www.cnn.com/2020/11/20/business/period-leave-asia-intl-hnk-dst/index.html> [<https://perma.cc/P8U6-KX4M>].

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., Francis, *supra* note 2 (discussing examples of companies in Australia adopting menstrual leave); Angela Haupt, *Menstrual Leave: Why Some Companies Are Offering Time Off for Periods*, WASH. POST (May 25, 2022), <https://www.washingtonpost.com/wellness/2022/05/25/menstrual-leave-spain-paid-benefits> [<https://perma.cc/7RFE-R272>] (discussing examples of companies in the United States adopting menstrual leave); Kassam, *supra* note 1 (discussing other international examples).

<sup>40</sup> See Francis, *supra* note 2 (“The idea of introducing these policies is spreading in some countries that haven’t traditionally offered support for menstruating employees.”).

<sup>41</sup> *Id.* (discussing a template policy put forward by the Victorian Women’s Trust).

<sup>42</sup> *Menstrual Policy Template*, VICTORIAN WOMEN’S TRUST, <https://www.vwt.org.au/menstrual-policy-2> [<https://perma.cc/DG9A-6CL7>].



policies is reportedly much higher than is typical under the legal mandates.<sup>43</sup> This is not surprising. By adopting such policies voluntarily, companies signal support, and high-ranking leaders often make statements about the policies that encourage use.<sup>44</sup>

Nonetheless, news reports regarding menstrual leave reflect deep ambivalence about both legal mandates and voluntary employer policies. As one reporter put it, “Every few years, the topic of period leave hits the headlines in Western countries,” and “[j]ust as often, it’s accompanied by scathing think pieces about why it’s a bad idea.”<sup>45</sup> Often, the critique comes from individuals who are worried about negative impacts on women, rather than the lost productivity that the company might experience. For example, an op-ed on a new company policy was titled “I’m a feminist. Giving women a day off for their period is a stupid idea.”<sup>46</sup> Other recent news reports quoted concerns that such policies “put[] feminism back by 100 years”<sup>47</sup> or are simply a “crazy plan.”<sup>48</sup>

The artwork accompanying stories about menstrual leave in the popular media reflects—and arguably contributes to—the concern that menstruators will be perceived as sub-standard employees. Frequently, the pictures highlight the extended duration of menstrual periods and suggest that they will interfere with the work; they also often use visual cues that evoke sexist stereotypes. For example, a story published in March 2022 features a [drawing](#) of a woman, curled up in a fetal position, with a calendar behind her on which four full days were blocked off with pink hearts.<sup>49</sup> The newspaper used the same picture to accompany a more recent story discussing the Spanish leave law and menstruation leave in other nations.<sup>50</sup> Another leads

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<sup>43</sup> Compare Francis, *supra* note 2 (describing uptake of a menstrual leave policy of six days per employee per year at the Victorian Women’s Trust, a voluntary adopter of such a policy), with Kassam, *supra* note 1 (discussing a study in Japan, which has mandatory menstrual leave, finding uptake of less than one day per employee per year), and Hollingsworth, *supra* note 37 (discussing 2017 survey results showing that only 0.9% of female employees claimed period leave in Japan).

<sup>44</sup> See, e.g., VICTORIAN WOMEN’S TRUST, *supra* note 42 (quoting the Trust’s Executive Director on the positive effects of the policy); Francis, *supra* note 2 (quoting the CEO of Modibodi, saying that supporting employees with policies like menstrual leave empowers them to want to be at work).

<sup>45</sup> Hollingsworth, *supra* note 37.

<sup>46</sup> Barkha Dutt, Opinion, *I’m a Feminist. Giving Women a Day Off for Their Period Is a Stupid Idea.*, WASH. POST (Aug. 3, 2017, 8:00 PM), <https://www.washingtonpost.com/news/global-opinions/wp/2017/08/03/im-a-feminist-but-giving-women-a-day-off-for-their-period-is-a-stupid-idea> [<https://perma.cc/Z6GC-UPXG>].

<sup>47</sup> Kassam, *supra* note 1.

<sup>48</sup> Kylie Lang, *As a Working Woman in Australia I’m Insulted by This Crazy Plan*, THE COURIER MAIL (June 2, 2017, 12:00 AM), <https://www.couriermail.com.au/rendezview/as-a-working-woman-in-australia-im-insulted-by-this-crazy-plan/news-story/4fedf54e5722d1e5812da901a9da10f7> [<https://perma.cc/42Y4-6FHQ>].

<sup>49</sup> Haupt, *supra* note 39.

<sup>50</sup> Masih, *supra* note 5.

off with a [depiction](#) of a worker whose face is entirely obscured by a blot of stylized blood and a calendar.<sup>51</sup> And a third, on the history of leave policies, is introduced by an [illustration](#) of a largely pastel-colored office, foregrounding an empty pink chair at a pink desk, while a man in the background at a deep mahogany desk is hard at work.<sup>52</sup> (This article notes that in the late nineteenth and early twentieth centuries, women's menstruation was used as a justification for keeping women out of the workforce generally and that during the 1930s and 1940s, companies undertook education campaigns to convince their female employees that they *could* work during their periods.<sup>53</sup>)

A large-scale survey, summarized by Crawford & Waldman, suggests the naysayers may have a point.<sup>54</sup> The researchers conducting the study described a policy that would offer menstruators who were unable to work paid leave, and then asked a representative sample of American adults, both male and female, open-ended questions about how they would view the policy. Although close to half the respondents said they would support such a policy, only 23% thought it would have positive effects, while 49% thought it would have negative effects, and 13% thought it would have both positive and negative effects.<sup>55</sup> The respondents who thought that the policy would have positive effects believed that it would help menstruators experiencing serious discomfort and that it might destigmatize menstruation. However, many respondents indicated that it would be unfair to men and that menstruators might abuse the policy, and some thought it would promote sexism in the workplace. As one respondent put it, "I'm concerned men will roll their eyes, and that this sort of policy reinforces negative stereotypes about women."<sup>56</sup> Almost one in ten respondents said that they thought managers would discriminate against women in hiring and promotion decisions to avoid potential monthly absences.<sup>57</sup> Such concerns have a long history.

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<sup>51</sup> Hollingsworth, *supra* note 37.

<sup>52</sup> Robin Hilmantel, *A History of How Employers Have Addressed Women's Periods*, TIME (Mar. 3, 2016, 2:43 PM), <https://time.com/4246662/period-policies-at-work> [<https://perma.cc/SW54-RUJ3>].

<sup>53</sup> *See id.*; *see generally* SHARRA A. VOSTRAL, UNDER WRAPS: A HISTORY OF MENSTRUAL HYGIENE TECHNOLOGY (2008) (discussing this history in detail).

<sup>54</sup> *See* MENSTRUATION MATTERS, *supra* note 7, at 124–25 (describing the study by Barnack-Tavlaris et al. discussed *supra* note 19).

<sup>55</sup> Barnack-Tavlaris et al., *supra* note 19, at 1361.

<sup>56</sup> *Id.* at 1365.

<sup>57</sup> *Id.* at 1367–68.

## III

DISCRIMINATION, ACCOMMODATION, AND LEAVE:  
INTERACTIONS AND TENSIONS

The skepticism with which proposals for menstrual leave are met, and particularly the fear that mandating time off specifically for menstruation could lead to discrimination, is quite similar to concerns raised in debates around maternity leave. As I develop in detail elsewhere, this issue raises three interrelated concepts.<sup>58</sup> The first is what's typically called "discrimination"—the risk that pregnant workers or new parents will be fired or otherwise treated worse at work. The second is a need for what is usually called "accommodations"—changes made *at work* to help employees continue in a job, notwithstanding health or other needs.<sup>59</sup> And the third is typically called "leave"—the right to take time off from work without losing a job. These can interact. For example, if a worker is denied an accommodation, she might be forced to take leave.<sup>60</sup> And mandating accommodations or requiring leave can spur discrimination against employees who seek such supports, or against employees or prospective employees who might be *expected* to seek such supports.<sup>61</sup>

Given this interplay, during the 1970s and 1980s, academic theorists and feminist activists in the U.S. debated whether women would be better served by sex-neutral provisions that addressed health conditions that could be temporarily disabling, or special supports for pregnancy, childbirth, and new mothers.<sup>62</sup> This is often known as the "special treatment/equal

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<sup>58</sup> See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 972–75 (2013) [hereinafter Widiss, *Gilbert Redux*].

<sup>59</sup> Importantly, the extent to which a given employee might need "accommodations," "leave," or other "special" treatment, depends on the baseline structures of an organization. If workplaces routinely allowed all workers to access the restroom whenever necessary, no one would need special permission to do so. This idea has been well-developed in the context of disability advocacy because many workplaces are designed with able-bodied employees in mind. A parallel can be drawn in the gender equality arena, as most workplaces and workplace rules are designed with male employees in mind. See *id.* at 977–78.

<sup>60</sup> See, e.g., *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 211 (2015) (noting that because UPS would not accommodate the pregnant employee's lifting restriction she was forced to take unpaid leave and lost health insurance during her pregnancy).

<sup>61</sup> See, e.g., Widiss, *Gilbert Redux*, *supra* note 58, at 976 (discussing statement from industry representative that if employers were forced to provide leave they would simply discriminate against women); see also, e.g., Lúcia Farré, *Parental Leave Policies and Gender Equality: A Survey of the Literature*, 34 ESTUDIOS DE ECONOMÍA APLICADA 45, 52 (2016) (discussing how extended maternity leaves may lead to employers being less likely to hire women into high-level positions).

<sup>62</sup> See Widiss, *Gilbert Redux*, *supra* note 58, at 966–67 nn.13–15, 989–1003 (collecting academic commentary on the debate from the 1970s and 1980s and discussing how the debate shaped the Pregnancy Discrimination Act); Deborah Dinner, *The Costs of Reproduction: History*

treatment” debate.<sup>63</sup> In most respects, the U.S. adopts the “equal-treatment” approach: It addresses potential accommodation and leave needs related to pregnancy and infant care through general, sex-neutral, provisions rather than “special” supports, a structure chosen in the hope that it would reduce the risk of discrimination. This is largely a matter of statutory law, rather than constitutional law.<sup>64</sup>

In 1978, Congress passed the Pregnancy Discrimination Act (“PDA”), which amended Title VII, the federal law that prohibits employment discrimination. The PDA clarifies that discrimination on the basis of sex includes discrimination on the basis of “pregnancy, childbirth, or related medical conditions.”<sup>65</sup> The PDA further requires that employers treat employees affected by “pregnancy, childbirth, or related medical conditions” the “same” as other persons “not so affected but similar in their ability or inability to work.”<sup>66</sup> The PDA is designed to ensure that pregnant workers have recourse if they are treated worse than other employees simply because they are pregnant.

The PDA is also relevant to pregnant workers who might need accommodations. Although it does not explicitly require accommodations, its mandate that pregnant workers be treated the “same” as other workers with comparable limitations has been interpreted to require employers to at least provide a non-discriminatory justification for treating pregnancy less well than other health conditions, should they do so.<sup>67</sup>

Another federal law that can be applicable to both pregnancy-related discrimination and pregnancy-related accommodation needs is the Americans with Disabilities Act of 1990 (“ADA”). The ADA prohibits discrimination on the basis of disability, defined as an impairment that substantially limits an employee’s ability to conduct major life activities, and it requires employers to provide “reasonable accommodations” for such

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*and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 416 (2011) (arguing that antidiscrimination arguments were intertwined with efforts to shift the costs of reproduction from individual families to larger society).

<sup>63</sup> See Widiss, *Gilbert Redux*, *supra* note 58, at 966 & nn.13–14, 967 nn.15–16 (collecting scholarly articles articulating and debating these competing claims as to how best to support pregnant workers).

<sup>64</sup> In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that policies that disadvantage (or, potentially, advantage) pregnancy are not sex-based classification, and thus generally do not trigger heightened scrutiny under the Equal Protection Clause. Crawford and Waldman offer a persuasive critique of *Geduldig* and argue that more recent cases have undermined its reasoning. MENSTRUATION MATTERS, *supra* note 7, at 44–48. However, shortly after their book was published, the Court reaffirmed *Geduldig* as the basis for rejecting claims that abortion restrictions are unconstitutional sex discrimination. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022).

<sup>65</sup> 42 U.S.C. § 2000e(k).

<sup>66</sup> *Id.*

<sup>67</sup> See *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 229–30 (2015).

disabilities unless doing so would be an “undue hardship” on the employer.<sup>68</sup> Although the ADA was initially interpreted very restrictively, significant amendments in 2008 clarify that it can apply to temporary disabilities, including those associated with pregnancy.<sup>69</sup>

While the PDA and ADA require accommodations for some pregnancy-related needs, “normal” pregnancies can fall through the gaps.<sup>70</sup> To address this problem, states began to pass “Pregnant Workers Fairness Acts” (“PWFA”), which explicitly require employers to provide reasonable accommodations for “pregnancy, childbirth, or related medical conditions.”<sup>71</sup> In less than a decade, from 2013 to 2022, twenty-five states passed such laws.<sup>72</sup> In December 2022, Congress enacted comparable federal legislation; it will become effective in June 2023, providing workers in all states these key protections.<sup>73</sup> The federal and state PWFA laws provide pregnancy-specific benefits, but they still fit generally within a same-treatment approach, in that they’re designed to raise support for pregnancy and related conditions *up to* the level of support provided to health conditions that qualify as disabilities.

The primary federal law that addresses leave from work is the Family and Medical Leave Act (“FMLA”).<sup>74</sup> A driving impetus for the FMLA was allowing new parents, and particularly new mothers, to take time off work.<sup>75</sup>

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<sup>68</sup> 42 U.S.C. § 12112.

<sup>69</sup> See Widiss, Gilbert *Redux*, *supra* note 58, at 1006–09; see generally Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97 (2013); Jeanette Cox, *Pregnancy As “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012).

<sup>70</sup> See Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L.J. 1131, 1136–43 (2022) [hereinafter Widiss, *Pregnant Workers Fairness Acts*] (discussing how pregnancy-related accommodation needs can fall through the gaps in federal laws prior to the enactment of a federal PWFA); see generally Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After Young v. UPS: Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL’Y (2020); Joanna Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After Young v. United Parcel Service, Inc.*, 14 HARV. L. & POL’Y REV. 319 (2020).

<sup>71</sup> See Widiss, *Pregnant Workers Fairness Acts*, *supra* note 70, at 1144.

<sup>72</sup> See *id.*

<sup>73</sup> See Pregnant Workers Fairness Act, H.R. 2617–1626, 117th Cong. § 102(2)(B)(i) (2022) (requiring all employers with at least fifteen employees to provide such accommodations); see also H.R. 1065, 117th Cong. (2021); Widiss, *Pregnant Workers Fairness Acts*, *supra* note 70, at 1154–56 (discussing earlier efforts to pass the standalone federal law).

<sup>74</sup> See 29 U.S.C. § 2601. Leave can also sometimes be required as an accommodation under the ADA, PDA, or PWFA. See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2016-1, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (May 9, 2016), <https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act> [<https://perma.cc/QCC4-6CA6>].

<sup>75</sup> See Widiss, Gilbert *Redux*, *supra* note 58, at 1001–02 (discussing this history); see also, e.g., RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 17–42

Again, however, the United States adopted a gender-neutral approach to this issue. While most other countries provide maternity leaves that are considerably longer than paternity leaves,<sup>76</sup> the FMLA allows each parent to take up to 12 weeks of unpaid leave when a child is born, adopted, or fostered.<sup>77</sup> This was a strategic calculation. At the time, advocates believed it would have been considerably easier to pass a maternity-specific leave law and that such a law might have applied even to small employers, which the FMLA does not.<sup>78</sup> However, they hoped the gender-neutral nature of the leave would encourage fathers to take leave and reduce discrimination against mothers.<sup>79</sup> The FMLA also provides time off work for employees to address their own serious health conditions or to provide care to family members with such conditions.<sup>80</sup> Integrating family leave rights with medical leave rights was also an advocacy strategy intended to reduce the risk of discrimination against mothers or new parents generally, but one that also arguably required additional concessions in terms of coverage.<sup>81</sup>

The FMLA only applies to employers with at least fifty employees, and to workers who meet hour and longevity requirements;<sup>82</sup> this means that only 56% of the private workforce is eligible for leave under the law.<sup>83</sup> It is also unpaid. Subsequent efforts to amend the FMLA to cover smaller employers, or to provide paid leave, have faltered.<sup>84</sup> That said, a growing number of states have passed laws that are generally similar in structure to the FMLA but provide *paid* leave.<sup>85</sup> And, although relatively few men took extended unpaid leaves under the FMLA, men make up a relatively large and growing share of claimants under paid leave.<sup>86</sup> In short, the gender-neutral structure

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(1996) (detailing the history of the lobbying efforts and strategy advocates employed when crafting the FMLA).

<sup>76</sup> See generally Deborah A. Widiss, *The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently-Enacted Laws in the United States and Australia*, 41 COMPAR. LAB. L. & POL'Y J. 723 (2021) [hereinafter Widiss, *Hidden Gender*].

<sup>77</sup> 29 U.S.C. § 22612(a)(1).

<sup>78</sup> See, e.g., ELVING, *supra* note 75, at 38–39 (discussing negotiations over whether the bill should be scaled back to just maternity leave); JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 118 (2010) (asserting a prominent advocate had told the author that a maternity-specific bill could have passed a decade earlier than the FMLA did).

<sup>79</sup> See Widiss, *Gilbert Redux*, *supra* note 58, at 1001–02 (discussing this history and citing additional sources).

<sup>80</sup> 29 U.S.C. § 2612(a)(1).

<sup>81</sup> See, e.g., ELVING, *supra* note 75, at 17–42.

<sup>82</sup> 29 U.S.C. §§ 2611(2), (4).

<sup>83</sup> See SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, *ABT ASSOC., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT* 6 (2020).

<sup>84</sup> See Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2208–15 (2021) (discussing proposed federal bills to provide paid leave).

<sup>85</sup> See Widiss, *Hidden Gender*, *supra* note 76, at 729–32 (discussing these state laws).

<sup>86</sup> See *id.* at 743–46; see also, e.g., KELLY BEDARD & MAYA ROSSIN-SLATER, *THE ECONOMIC*

may also be helping shift gender norms and encouraging a more equal sharing of care responsibilities.

#### IV

##### THE PREGNANCY ANALOGY, ITS LIMITATIONS, AND UNIVERSAL ALTERNATIVES

This backdrop of existing laws relating to pregnancy, childbirth, and parenting shapes both possibilities for and potential pitfalls of seeking workplace support for menstruators. Title VII, the PDA, and the ADA provide support for claims related to discrimination on the basis of menstruation. Those laws, and also potentially the PWFA, may also require accommodations for menstruation, although there may be some gaps in coverage. However, existing federal law offers little recourse for menstruators who might need regular time off from work. While a menstrual-specific leave could address this need, it also might spur greater discrimination against menstruators: Even if such discrimination were nominally unlawful, it can be difficult to prove. Accordingly, rather than seeking menstrual-specific policies, advocates might want to pursue universal alternatives, such as ensuring all workers have regular access to menstrual-friendly restroom facilities and reasonable time off for medical needs. This Part addresses each of these points in turn.

Menstruators can face discrimination or harassment at work, even if they do not require accommodation or ask for leave.<sup>87</sup> For example, in one particularly egregious case, a prison employee who was required to undergo a routine body scan to confirm that she was not providing contraband to inmates was fired because the scan revealed that she had removed a “suspicious” object—a.k.a. a tampon—from her vagina while in the prison.<sup>88</sup> Courts should recognize that such discrimination is illegal under existing laws. As I develop elsewhere, firing an employee because she is menstruating should be actionable sex discrimination, in that it is an adverse action against an employee for a sex-linked characteristic.<sup>89</sup> This reasoning

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AND SOCIAL IMPACTS OF PAID FAMILY LEAVE IN CALIFORNIA: REPORT FOR THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT 2, 28 fig.5 (Oct. 13, 2016), [https://www.edd.ca.gov/disability/pdf/PFL\\_Economic\\_and\\_Social\\_Impact\\_Study.pdf](https://www.edd.ca.gov/disability/pdf/PFL_Economic_and_Social_Impact_Study.pdf) [<https://perma.cc/68MZ-TBBL>] (reporting 40% of fathers claiming benefits took the full six weeks available).

<sup>87</sup> See MENSTRUATION MATTERS, *supra* note 7, at 109–10.

<sup>88</sup> *Id.*

<sup>89</sup> See Deborah A. Widiss, *Menstruation Discrimination and the Problem of Shadow Precedents*, 41 COLUM. J. OF GENDER & L. 235 (2021) [hereinafter Widiss, *Menstruation Discrimination*]. In this essay, I argue menstruation discrimination is itself discrimination on the basis of sex, in addition to any claim based on the PDA’s “related medical condition” language.

could also apply to claims brought by trans-men or non-binary persons who face discrimination based on menstruation.<sup>90</sup> Menstruation might also be considered a “related medical condition” to pregnancy, and thus come within the ambit of the PDA’s explicit text.<sup>91</sup> Additionally, discrimination related to certain pregnancy-related conditions might constitute disability discrimination, and discrimination related to perimenopause or menopause might constitute age discrimination.<sup>92</sup>

Existing law also provides at least some support for menstruators who need accommodations at work. Some health conditions associated with menstruation, such as endometriosis—which causes significant levels of pain that may interfere with the ability to conduct major life activities—could qualify as disabilities under the ADA.<sup>93</sup> The recently-enacted federal PWFA law requires accommodations for “pregnancy, childbirth, or related medical conditions.”<sup>94</sup> This language, which is borrowed from the PDA, could likewise provide a basis for asking for accommodations for menstruation-related needs.<sup>95</sup> Thus, both the ADA and PWFA could arguably provide a basis for menstruators to ask for accommodations, such as extra restroom breaks (although, as discussed below, OSHA regulations should address the need for regular restroom access without requiring

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Some courts have properly recognized menstruation discrimination as sex discrimination, *see, e.g.*, *Flores v. Virginia Dep’t of Corr.*, No. 5:20-cv-00087, 2021 WL 668802 (W.D. Va. 2021), but others have held (incorrectly, I would suggest) that it is not, *see, e.g.*, *Coleman v. Bobby Dodd Inst.*, No. 4:17-CV-29, 2017 WL 2486080 (M.D. Ga. June 8, 2017); *Karin, supra* note 7, at 492–95 (discussing mixed caselaw on point).

<sup>90</sup> *See* Widiss, *Menstruation Discrimination, supra* note 89, at n.14.

<sup>91</sup> *See* MENSTRUATION MATTERS, *supra* note 7, at 115–20 (noting that the first portion of the menstrual cycle is the uterine lining building up in anticipation of pregnancy and that the subsequent bleeding occurs if a fertilized egg is not implanted at the right point in the cycle); *see also* *Karin, supra* note 7, at 494–95 (making a similar argument but discussing mixed caselaw on point). On the other hand, some might object to seeing menstruation as a subsidiary of pregnancy, rather than a normal biological process experienced by half of the human population, including many who will never become pregnant or bear children, for much of their lives. I thank my student Elizabeth Berg for making this point to me.

<sup>92</sup> *Karin, supra* note 7, at 499–501.

<sup>93</sup> *See, e.g., id.* at 478–80 (discussing ADA cases addressing menstruation and menopause-related conditions).

<sup>94</sup> Pregnant Workers Fairness Act, 42 U.S.C.A. § 2000gg-1 (West 2022).

<sup>95</sup> *See* sources cited *supra* notes 67–71. Federal law also requires “reasonable break time” for nursing mothers to express breastmilk. *See* 29 U.S.C.A. § 218d(a)(1). This is not directly applicable to menstruators, but it provides a model for break time responding to a sex-linked characteristic; in the future, it’s possible that a similar provision could be made for menstruators. My thanks to Marcy Karin for suggesting this idea to me. Theoretically, this might, like menstrual-specific leave, spur discrimination against menstruators; however, that risk seems relatively low since the extra benefit would be regular short breaks *at* work, not paid time off *from* work. The bigger question might be whether menstruators would be willing to disclose their periods to claim such extra breaks. Again, I tend to believe that a more universal solution, such as effective enforcement of OSHA regulations or laws that require regular rest breaks for all employees, would be preferable. *See infra* text accompanying notes 101–04.



accommodations) or access to fans, pain relievers, or other items to address symptoms of menstruation or perimenopause. Menstruators might also ask permission to work from home or for occasional (typically unpaid) time off as an accommodation.<sup>96</sup>

A regular right to leave, however, is different. First, as a matter of existing law, most menstruators would not have a right to take leave under the FMLA. Under that law, medical leave is available only for “serious health conditions” and menstruation would generally not qualify.<sup>97</sup> It is therefore unsurprising that the conversation regarding menstrual leave assumes the necessity of a separate policy or law. But even if a specific menstrual leave right could be enacted, those who critique the idea may have valid concerns. These concerns stem, in large part, from the fact that although both pregnancy and menstruation are linked with female reproductive biology, there are important differences as applied to leave.

Most workers will take parental leave only a very few times over approximately fifty years of working life.<sup>98</sup> By contrast, many working women experience menstruation monthly and thus work through an average of 450 menstrual cycles over a lifetime.<sup>99</sup> That said, menstruation, at least for most people, is far less disruptive of one’s ability to work than are childbirth and infant care. Practically every birth mother will find it difficult, if not impossible, to work for at least a few weeks after childbirth, and many new parents seek time off to provide care to a new child. By contrast, many menstruators will never feel the need to take time off from work for menstruation. Additionally, while men can—and in the U.S. do—receive leave to provide infant care, there’s no obvious gender-neutral analog for

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<sup>96</sup> Under the ADA, employers are sometimes required to provide leave, even when an employer does not offer leave to other employees. *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 74 (explaining that an employer may be required to provide leave to an employee as a reasonable accommodation, even when the employer does not offer leave to other employees or when the employee is not eligible under the employer’s leave policies). Presumably, the same reasoning will apply under the PWFA. Prior to the COVID-19 pandemic, courts typically held that teleworking from home was an undue hardship to employers. However, those precedents may be revisited now that the COVID-19 pandemic has made it clear that many jobs may be done remotely. *See, e.g.*, Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL’Y 203, 218 (2021) (arguing that it is “no longer tenable” in a post-pandemic world “for courts to define work as something done only at a specified place and time, and without any work-life interruptions”).

<sup>97</sup> Medical leave is available for “serious health conditions,” defined as requiring inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider. 29 U.S.C. § 2611(11) (2023).

<sup>98</sup> Approximately 86% of women in the United States have given birth by age 44, and women who are mothers have on average 2.4 children. *See* Gretchen Livingston, *They’re Waiting Longer, but U.S. Women Today More Likely to Have Children than a Decade Ago*, PEW RES. CTR. (Jan. 18, 2018), <https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago> [<https://perma.cc/P6K2-CWZR>].

<sup>99</sup> *See* Chavez-MacGregor, *supra* note 24, at 103–04.

leave for menstruation.

The routineness of menstruation, its relatively less severe symptoms, and the lack of a gender-neutral equivalent suggest that concerns that guaranteed menstrual leave could cause backlash may be warranted. As Crawford & Waldman put it, virtually all employees would enjoy receiving regular days off; a menstrual leave policy could be controversial because it “raises the specter of winners (menstruating employees) and losers (nonmenstruating employees).”<sup>100</sup> There are real and legitimate reasons why some menstruators find it difficult to work at times, and most menstruators need regular, and sometimes immediate, access to restrooms. But the risk that menstrual-specific leaves could increase discrimination against menstruators suggests it may be preferable to advocate for more humane treatment of workers generally. In other words, a more universal approach might be both more politically viable and ultimately more effective.

First, menstruators sometimes seek “extra” bathroom breaks as an accommodation, or indicate that they need to take time off work because they cannot use the bathroom as often as required. But regular access to a restroom should not require any kind of “special” treatment, because *all* workers are supposed to have this as a basic workplace right.<sup>101</sup> OSHA regulations provide that employers must “[a]llow workers to leave their work locations to use a restroom when needed” and that they must “[a]void imposing unreasonable restrictions on restroom use.”<sup>102</sup> Many employers, however, sharply curtail access to restrooms, particularly for low-wage workers. Some of these stories are shocking, such as a company that allegedly limited bathroom breaks to a total of six minutes per day,<sup>103</sup> or workers who develop health problems from being denied access to bathrooms.<sup>104</sup> This is a problem for menstruators; it is also a problem for

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<sup>100</sup> MENSTRUATION MATTERS, *supra* note 7, at 125.

<sup>101</sup> *Id.* at 117–18. Also, although the federal Fair Labor Standards Act does not require employers to provide regular breaks for restroom access, meals, or simply rest, several state laws do. See Karin, *supra* note 7, at 475; see also *Meal and Rest Break Laws in the Workplace: 50-State Survey*, JUSTIA, <https://www.justia.com/employment/employment-laws-50-state-surveys/meal-and-rest-break-laws-in-the-workplace-50-state-survey> [<https://perma.cc/ZY42-P4WQ>] (providing citations and links to state laws requiring breaks).

<sup>102</sup> *Restrooms and Sanitation Requirements*, OSHA, <https://www.osha.gov/restrooms-sanitation> [<https://perma.cc/DTN7-9D2J>] (last visited Oct. 4, 2021); see also Karin, *supra* note 7, at 483 (discussing the role of a class action suit, in which the named plaintiff was a menstruating worker who was denied bathroom access, in spurring the promulgation of this rule); *id.* at 483–86 (discussing OSHA enforcement actions relating to menstruators).

<sup>103</sup> See, e.g., Corilyn Shropshire, *6 Minutes a Day for Bathroom Breaks? Union Cries Foul*, CHI. TRIB. (July 10, 2014), <https://www.chicagotribune.com/business/chi-bathroom-breaks-watersavers-union-complaint-20140710-story.html> [<https://perma.cc/GG4M-GANP>].

<sup>104</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-12, WORKPLACE SAFETY AND HEALTH: BETTER OUTREACH, COLLABORATION, AND INFORMATION NEEDED TO HELP PROTECT

many other workers. Rather than address the issue simply for menstruators, menstrual justice advocates might join with others seeking effective enforcement of OSHA rules.

Menstruators may sometimes need to miss work because of menstruation when symptoms are particularly bad—but very few need to miss work every month.<sup>105</sup> As noted above, even in countries that *do* mandate menstrual leave, many workers simply use sick time rather than seek time off under the specific policy.<sup>106</sup> Many respondents to the survey on attitudes towards a potential menstrual leave policy likewise suggested that workers should use sick time instead.<sup>107</sup> The problem is that there is no federal law in the United States that guarantees sick time. Most full-time workers receive some sick days, but just about half of part-time workers, who are disproportionately likely to be women and people of color, do.<sup>108</sup> For workers without sick days, any absence can mean loss of a job. This is unfair to menstruators; it is also unfair to anyone else who needs to miss work because of occasional illness.

While advocacy for menstrual leave laws has not gained significant traction in the U.S., there has been quick growth in policies guaranteeing paid sick days. In fewer than fifteen years, roughly one-third of states have passed such laws.<sup>109</sup> And most menstruators would receive the protection they need—occasional days off—from such laws.<sup>110</sup> This is not to suggest that menstruation is an illness, but rather that most sick day policies and laws are drafted in such a way that they could encompass time off where necessary for menstruation. Some might argue it is unfair that menstruators would need

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WORKERS AT MEAT AND POULTRY PLANTS 26–29 (2017) (noting that workers at meat and poultry processing plants frequently said bathroom access was sharply limited and also observing that OSHA may be missing violations by failing to ask directly about bathroom access when conducting inspections).

<sup>105</sup> See Schoep et al., *supra* note 30 and accompanying text (noting that approximately 11% of menstruators report occasionally missing work because of menstruation but only 2.4% missed virtually every cycle).

<sup>106</sup> See *supra* note 38 and accompanying text.

<sup>107</sup> See Barnack-Tavlaris et al., *supra* note 19, at 1367 (noting that 12.5% of survey respondents believed “employees should just use a regular sick day if they have severe symptoms”).

<sup>108</sup> See U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2022, tbl. 7 (2022), <https://www.bls.gov/ebs/publications/september-2022-landing-page-employee-benefits-in-the-united-states-march-2022.htm> [<https://perma.cc/8L57-RBKQ>] (reporting 88% of full-time civilian workers receive paid sick days and 51% of part-time workers do).

<sup>109</sup> See *Overview of Paid Sick Time Laws in the United States*, A BETTER BALANCE (June 22, 2022), <https://www.abetterbalance.org/paid-sick-time-laws/?export> [<https://perma.cc/T2KY-JLD6>] (showing that sixteen states plus Washington, D.C., and several counties and cities guarantee paid sick time or guarantee more general paid time off that can be used for sick days).

<sup>110</sup> For the small percentage of menstruators who need time off every cycle, there would often be an underlying medical condition (beyond “normal menstruation”) that could qualify as a disability under the ADA. See Karin, *supra* note 7, at 478–82 (discussing ADA cases addressing menstruation and menopause-related conditions).

to rely on a general sick day policy to cover both “regular” sickness and also menstruation.<sup>111</sup> Nonetheless, on balance, rather than pushing for an explicit menstrual leave, with the potential backlash it might cause, menstrual justice advocates might do well to throw their weight behind advocacy for this more basic workplace right.<sup>112</sup>

The companies with menstrual leave policies in place emphasize a separate positive benefit: destigmatizing menstruation. This is an important objective, to be sure. However, providing free menstrual hygiene products in workplaces may be a more effective way of achieving this goal, in that it signals acceptance of menstruation without triggering a risk of discrimination against menstruators. Employers should ensure restrooms are “menstrual friendly” in other ways as well, such as by offering privacy and access to soap and water, adequate toilet paper, and trash receptacles for disposal of used products.<sup>113</sup> Both men’s and women’s restrooms (as well as gender-neutral restrooms) should be designed to meet the needs of menstruators. This ensures that trans-men and non-binary persons who choose to use a men’s bathroom will be able to handle menstruation with dignity. It can also help remind cisgender men that menstruation is a normal process experienced by many of their coworkers.

Ready access to menstrual products within work bathrooms can be functionally important even for employees who have sufficient resources to buy menstrual products. This is because periods may catch employees by surprise if they are irregular or unusually heavy. Indeed, if products are not available, employees with flexibility often leave work to purchase what they need, reducing their time at work.<sup>114</sup> Employees who do not have that level of autonomy may be forced to work through a day in stained clothing, or leave without permission and risk disciplinary action.<sup>115</sup> A growing number

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<sup>111</sup> Menstruators (mostly women) might be further disadvantaged in that they are also more likely than non-menstruators (mostly men) to use sick days to care for sick children or elderly family members. *See, e.g.*, KRISTIN SMITH & ANDREW SCHAEFER, CARSEY INST., WHO CARES FOR THE SICK KIDS? PARENTS’ ACCESS TO PAID TIME TO CARE FOR A SICK CHILD 2 (2012) (reporting mothers are more likely than fathers to use sick days to care for children); NAT’L P’SHIP FOR WOMEN & FAM., THE FEMALE FACE OF FAMILY CAREGIVING 1 (2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/female-face-family-caregiving.pdf> [<https://perma.cc/39SE-BFX5>] (reporting that 60% of caregivers for adult family members are women).

<sup>112</sup> *See* Price, *supra* note 7, at 220–23 (proposing one day of paid leave per month, available to all employees without the need for explanation, as a universal alternative to menstrual leave).

<sup>113</sup> *See* Karin, *supra* note 7, at 465–66 (describing the minimum requirements to make a restroom menstrual-friendly and noting that many are not).

<sup>114</sup> *See id.* at 466 (citing studies showing employees often leave to purchase such products when not provided).

<sup>115</sup> *Cf.* *Coleman v. Bobby Dodd Inst.*, No. 17-CV-29, 2017 WL 2486080, at \*1 (M.D. Ga. June 8, 2017) (describing allegations of sex discrimination by a call center employee fired because menstrual blood from her “unpredictable” pre-menopausal periods leaked onto her office chair and carpet).

of employers now provide menstrual products in work restrooms, sometimes voluntarily and sometimes in response to legal requirements.<sup>116</sup> This meets real and pressing needs and can help normalize menstruation for everyone.

#### CONCLUSION

Roughly one half of the workforce menstruates regularly for much of their working lives. Up until now, there has been very little recognition of the extent to which menstruation may affect work. Crawford & Waldman, and the larger menstrual justice movement, make compelling arguments for why menstruators should not need to hide their condition at work and why it is essential that they receive appropriate support for it. However, rather than pushing for menstrual leave, advocates might consider working to expand universal supports that make workplaces more humane for *all* workers.

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<sup>116</sup> MENSTRUATION MATTERS, *supra* note 7, at 128–29.